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**IN THE SUPREME COURT OF THE STATE OF
IDAHO**

**MARTIN HAYES and LYNN HAYES, husband and
wife and the marital community thereof,**

Plaintiffs/Appellants,

vs.

**THE CITY OF PLUMMER, a political subdivision, and
WORLEY SCHOOL DISTRICT 44, a political
subdivision, and ACCELERATED CONSTRUCTION
& EXCAVATION, LLC, an Idaho Limited Liability
Company,**

Defendants/Respondents.

APPELLANTS' REPLY BRIEF

Appealed from the District Court of the First Judicial
District of the State of Idaho, in and for the County of
Kootenai

**HON. FRED M. GIBLER, DISTRICT JUDGE
PRESIDING**

MICHAEL T. HOWARD

ATTORNEY FOR APPELLANTS

PETER C. ERBLAND

ATTORNEY FOR RESPONDENTS

SUPREME COURT CASE NO. 42125

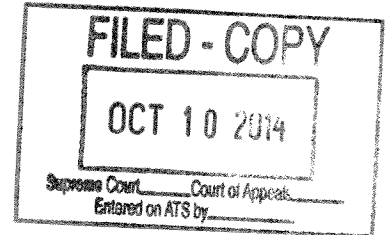


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I. SUMMARY OF REPLY

- A. The School District's provision of improvements, maintenance, labor and utilities at School Park were provided directly in exchange for its ability to use the property.
- B. Issues of fact exist on whether the compensation given by the School District for use of School Park created access for Hayes.

II. ARGUMENT

- A. The School District's maintenance, payment of utilities, and scheduling of events for School Park was provided in exchange for its use of the property.**

In its response, the City relies heavily upon the Idaho Federal Court's analysis in *Albertson v. Freemont County*, 834 F. Supp.2d 1117 (D. Idaho 2011). There, a snowmobiler was killed when he rode his snowmobile from a trail on national forest land onto a state highway and collided with a van. The Forest Service and Freemont County had an agreement to share the costs of maintaining the trail, and the decedent had paid the State of Idaho a \$31.00 snowmobile numbering fee, 85% of which has remitted to Freemont County.

However, the decision in *Albertson* hinged not upon the agreement to share the costs of maintaining the trail, upon the lack of any evidence demonstrating a relationship between the money remitted to the landowner (Freemont County) and permission for the snowmobiler to use or enter upon the land. More specifically, the Court noted that "the scheme for numbering snowmobiles has nothing to do at all with the land upon which the snowmobile might be operated." *Albertson*, 834 F. Supp. 2d. at 1131.

The undisputed facts presented here are quite different. The JSA entered into between the City and the School District sets forth a direct bargained-for exchange under which the School District is granted use of School Park in exchange for taking on certain obligations. [R. Vol. I, pp. 130, 163-164] More specifically, the JSA entered into between the City and the School District provides in relevant part:

2. Immediate improvement; Effective Date; Financing.

...

- c. Joint operation and use of the facilities shall commence upon completion of improvements provided for herein.

3. Future Use.

The primary purpose of the facilities shall be for outdoor recreation by the general public. The School District agrees that all outdoor recreation facilities on the site including those on adjacent shoal lands shall be open and available for general public use when not being used for regularly scheduled school activities.

[R. Vol. I, pp. 130, 163-164] (emphasis added)

In practice, the School District exercises near complete dominion and control of School Park, as testified to by the City itself:

Q. So my question to you is, do you know how much of the use of Plummer School Park is open for recreational purposes versus school purposes?

A. I --- I wouldn't have a figure for you, but as I am to understand it today, it is not used for public purposes that I am aware of. I -- I'm sorry to be difficult here, but you're being slightly -- you're not asking a direct question of me. The city currently has no scheduling of that park. So I'm to understand that the school is using it.

Q. Okay.

A. So if you want to refer to that as educational. Public use, there isn't any that I'm aware of.

...

Q. The second thing I wanted to ask you about, Mike had some questions about education use versus recreational use. Same area but I'm going to ask it a bit different. Obviously, there's football games in the fall for high school and rec league, whatever. During the summer, is there any organized sports that are not tied to the school, like little league, baseball and soccer, things of that nature you're aware of?

A. I am not aware of any.

[R. Vol. I, pp. 101, ln 2-16; 102, ln 20-25; 103 ln 1-4]

This relationship is exemplified the testimony of the School District:

Q. Let me talk for a minute or ask for a minute about the use of this football field. Is it open to the public all the time?

A. A person would have to -- or an organization would have to fill out a facility use form in order to be able to utilize that.

Q. Okay. And that probably segues into the next question, and how was this -- well, describe this facility use form. What is it?

A. Well, it's a -- if a -- if an activity needs to happen or if an organization or a private group wants to use something as -- that the school district utilizes -- you know, owns or utilizes -- and the football field would be one of those -- they would need to come in two weeks in advance and fill out a facility use agreement form and have to show proof of insurance and get permission to -- basically to look and see if the scheduling will work.

[R. Vol. I, pp. 75, ln 14-25; 76, ln 1-6]

Accordingly, unlike the determinative facts in *Albertson*, the facts here make it clear that the economic benefits provided by the School District are directly related to its access and use of School Park, and are "given in return for the express and direct privilege of being allowed to utilize the property." See *Albertson*, 834 F. Supp. 2d at 1131.

B. Issues of fact exist on whether the compensation given by the School District for use of School Park created access for Hayes.

In its response, the City asserts that generally School Park is open to the public without charge. *See Respondent's Response, p.2* However, protection under the Recreational Use Statute does not depend upon the general character of the property, but conditions protection upon whether the landowner received some economic benefit for allowing its land to be used at the time of the relevant incident:

(d) Owner Assumes No Liability. An owner of land or equipment who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

1. Extend any assurance that the premises are safe for any purpose.
2. Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
3. Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.

I.C. §36-1604.

The character of the land at any other time is irrelevant to the statutory analysis. The relevant issue here is whether the monetary and other in-kind compensation the City received from the School District created access to the property at the time of Hayes' injury.


In this regard, the record establishes that: 1) the City provided the School District with use and access to School Park pursuant to the JSA; 2) the City received monetary and in-kind compensation from the School District for its use of the School Park; 3) the football game at which Hayes was injured was scheduled by and through the School District; and 4) Hayes' presence at School Park arose solely because his invitation to attend that football game.

Accordingly, issues of fact exist as to whether Hayes entered the premises under the access granted to the School District at the time of his injury.

III. CONCLUSION

The City received compensation from the School District in the form of utilities and maintenance in exchange for the School District's use of the property. The District Court's Order Granting Summary Judgment should be reversed and the case remanded for trial to determine whether Hayes entered the land within the scope of the School District's use, which would obviate the City's immunity under I.C. §36-1604.

DATED this 7 day of October, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and complete copy of the foregoing to be ☒ mailed, postage prepaid; ☐ hand delivered; ☐ sent via facsimile on October 8th, 2014, to:

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